FILED
DEC 10 1992
OFFICE OF THE CLERK

No. 92-1014

In The

Supreme Court of the United States

October Term, 1992

SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS,

Petitioner,

v.

COALITION FOR CLEAN AIR, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Despite Congress's determination that the development of local air pollution control measures is initially the responsibility of State and local governments, is EPA required to promulgate a federal air pollution control plan in Southern California because EPA found in 1988 that California failed to meet air attainment requirements which have now been repealed by the 1990 Clean Air Act Amendments and replaced with new requirements which Southern California has not yet had the opportunity to meet.

PARTIES TO THE PROCEEDINGS BELOW

The appellants before the court of appeals in No. 91-55383 were the Coalition for Clean Air and Sierra Club, Inc. The appellant before the court of appeals in No. 91-55386 was the South Coast Air Quality Management District. The appellees in both cases were the United States Environmental Protection Agency (EPA), William K. Reilly, Administrator, Daniel G. McGovern, Regional Administrator, and David P. Howekamp, Director, Air and Toxics Division, EPA Region IX.

The Southern California Association of Governments intervened in the court of appeals in support of EPA. The Environmental Council of Sacramento and Sierra Club, Inc. participated in the court of appeals as *amici curiae* in support of the appellants.

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The Southern California Association of Governments ("SCAG"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 971 F.2d 219. The opinion of the district court is reported at 762 F.Supp. 1399. The opinions are contained in the appendix to petition for writ of certiorari (App. 1a-43a)

filed in this matter by the Solicitor General on behalf of the Environmental Protection Agency, et al. ("EPA's Petition").

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1992. A petition for rehearing was denied on September 11, 1992. (EPA's Petition, App. 44a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, as amended, are contained in the appendix to EPA's Petition. (App. 45a-47a.) Pursuant to section 174(a) of the Federal Clean Air Act, 42 U.S.C. § 7504, SCAG has been designated as one of the co-lead agencies responsible for development of the nonattainment air plans for the South Coast Air Basin.

The California statutes which mandate that SCAG participate in the process of preparing elements to be included in the State Implementation Plan ("SIP") for the South Coast Air Basin, Cal. Health & Safety Code §§ 40460, 40463, 40464, 40465, are reproduced in the appendix to this petition. (App. A1-A4.)

STATEMENT

SCAG hereby adopts the STATEMENT contained in EPA's Petition.

REASONS FOR GRANTING THE PETITION

SCAG concurs in, and adopts the interpretation of, the Clean Air Act and the 1990 Amendments in the REASONS FOR GRANTING THE PETITION contained in the EPA's Petition. SCAG petitions for a writ of certiorari independently of EPA to address the appropriate division of responsibility between the federal, state and local governments under the Federal Clean Air Act. SCAG wishes to emphasize the extremely important issue of state and local agency involvement in plan preparation, and the practical impacts of the court of appeals' decision on agencies like SCAG if they are precluded from primary involvement and full participation in the development of a plan to reduce emissions as contemplated by the Federal Clean Air Act and the 1990 Amendments. SCAG contains six counties, over a hundred cities and a population of approximately fifteen million.

SCAG is a duly constituted joint powers agency under California law, a regional governmental body, and the federally designated Metropolitan Planning Organization representing the Southern California counties of Los Angeles, Orange, San Bernardino, Riverside, Ventura, and Imperial, and most of the cities within those counties. As the regional council of governments, SCAG is independently responsible for a number of regional activities,

including transportation planning, water planning, housing needs planning, and air quality planning. SCAG also is responsible for preparing that portion of the Air Quality Management Plan for the South Coast Air Basin ("AQMP") which will become a part of the SIP for the South Coast Air Basin. The Ninth Circuit's opinion detrimentally affects SCAG's ability to perform its statutory obligations in some important ways which are different from and independent of the detriment suffered by EPA, as discussed below.

In connection with the implementation of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, SCAG has been charged by California's legislature, in coordination with cities and counties in the South Coast Air Quality Management District ("SCAQMD"), with the independent preparation of certain SIP elements for California's attainment of national ambient air quality standards ("NAAQS") for all criteria pollutants in the South Coast Air Basin. Cal. Health & Safety Code § 40460 (App., *infra*, A1-A2.) Specifically, SCAG is required to prepare and approve those elements relating to regional demographic projections and integrated regional land use, housing, employment and transportation programs, measures and strategies, and to provide related emissions data. California Health & Safety Code § 40460(b). (App., *infra*, A1.) SCAG also is charged with providing updated information with respect to these elements. California Health & Safety Code § 40463. (App., *infra*, A2-A3.) SCAG must coordinate the input of cities and counties in developing the elements for which it is responsible. California Health & Safety Code § 40464. (App., *infra*, A4.) SCAQMD must incorporate the elements prepared by SCAG into the AQMP, and

forward it to the California Air Resources Board for review and inclusion in California's SIP. The state's SIP subsequently is submitted to EPA. Cal. Health & Safety Code § 40465. (App., *infra*, A4.)

In accordance with its statutory mandate, SCAG has proposed measures necessary to achieve and maintain state and federal ambient air quality standards in the South Coast Air Basin. On March 17, 1989, SCAQMD adopted a revision to the AQMP for the South Coast Air Basin. After approval by the California Air Resources Board, the AQMP was submitted to EPA on August 18, 1989, as a revision to California's SIP. Under regulations proposed in the revised SIP, SCAG would coordinate an extensive transportation and land-use management program, SCAQMD would control emissions produced by industrial and commercial sources, and the California Air Resources Board would oversee reductions in emissions from consumer products and mobile sources. Prior to the enactment of the 1990 Amendments, California submitted the revised SIP for EPA's consideration and approval. As of this date, EPA has neither approved nor disapproved California's latest SIP submittal.

SCAG also has complied with the California Clean Air Act which requires local air districts along with councils of governments, such as SCAG, to prepare a similar plan for attainment of NAAQS. Cal. Health & Safety Code § 40911 *et seq.* SCAG approved and the California Air Resources Board has adopted, in October, 1992, a plan imposing obligations on local agencies within the South Coast Air Basin to meet air quality attainment requirements of the California statute.

SCAG has proposed measures, as required, necessary to achieve and maintain state and federal ambient air quality standards in the South Coast Air Basin. Most of the work on the matters which are necessary in order to develop a realistic attainment plan has been completed or is in the process of being completed.

The court of appeals' decision has significant consequences adversely affecting the ability of local agencies to attain NAAQS. The decision usurps the primary role of state and local agencies in controlling emissions, and decreases the likelihood that the goals of the Clean Air Act will be met. In addition to frustrating the goals of the Clean Air Act, the decision will affect most, if not all, Californians in the South Coast Air Basin (and the Sacramento and Ventura areas as well)[1] on a personal level. EPA-mandated control measures could result in severe economic and social consequences. Congress in adopting the 1990 Amendments, recognized that such severe economic and social dislocations should be avoided. In furthering this goal, Congress designated state and local agencies to be the primary source of the plan, relegating to EPA a secondary "backstop" role.

Achievement of NAAQS will depend significantly on the ability of each local jurisdiction to implement control measures contained in a plan. For implementation to be

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[1] This litigation will resolve not only the instant action, but will serve as precedent for other actions involving the Sacramento area, *Environmental Council of Sacramento v. EPA*, Civ. No. S-87-420 EJG (E.D. Cal. Dec. 2, 1991), *aff'd*, No. 92-15293, and the County of Ventura, *Citizens to Preserve the Ojai v. EPA*, No. CV-88-00982 HLH (C.D. Cal. March 13, 1991).

successful, control measures imposed on a city, for example, the size of Lomita in Los Angeles County (population 19,555) must necessarily be different than those imposed on, for example, the City of Los Angeles, with its 3 million plus residents and its correspondingly larger financial and resource capabilities. A city with a large industrial base such as Vernon should be subject to different control measures than a largely residential city such as Palos Verdes Estates. Similarly, rural and urbanized cities should be subject to different control measures to meet air quality attainment standards.

EPA does not have the knowledge or resources to design a plan that would be responsive to the important differences among the local jurisdictions. An example of the type of control measure EPA would adopt is gasoline rationing. 41 Fed. Reg. 45,565 (1976). While this draconian measure is as unlikely to be implemented now, if proposed, as when EPA proposed it, it exemplifies the type of unworkable, unattainable measure which fails to recognize the diversity among the local jurisdictions within the South Coast Air Basin and which is likely to be mandated by EPA if that entity is required to be primarily responsible for preparation of a plan for the South Coast Air Basin. State and local agency participation in the development of a plan pursuant to the newly adopted time limits and standards contained in the 1990 amendments to the Clean Air Act will ensure that the vast differences in the local jurisdictions in the South Coast Air Basin will be duly considered and the likelihood of achieving NAAQS substantially improved. These agencies for several years have been collecting and analyzing data concerning land use, transportation, demographics

and other information necessary to develop a workable plan to achieve NAAQS.

Further, a plan developed by EPA without primary input from state and local agencies could, and probably would, overlap, conflict with and duplicate the air plans already developed by the state and local agencies under the California Clean Air Act and the Federal Clean Air Act, causing needless expenditure of public funds, unnecessary confusion as to which plan to follow, and unnecessary delay in attainment of NAAQS.

SCAG has a vital interest in coordinating and representing the interests of affected local governments in connection with the imposition of air quality requirements in the South Coast Air Basin. If the court of appeals' decision is permitted to stand, it will impair SCAG's ability to take advantage of the opportunity to prepare and suggest air attainment strategies as authorized and encouraged under the new provisions of the 1990 Federal Clean Air Act Amendments. SCAG's input under the new time limitations established by the 1990 Amendments to the Federal Clean Air Act will ensure the involvement of the impacted Southern California counties and cities in air quality planning and implementation in the South Coast Air Basin.

The better construction of the Federal Clean Air Act, and the one clearly contemplated by Congress, is one which allows state and local agencies to perform the functions of developing a plan and delegates to EPA the role of reviewing the plan. Enforcing the terms of the Settlement Agreement requiring EPA to prepare a plan in the first instance would require needless expenditure of

taxpayer funds to enforce time limitations and attainment standards that have been repealed by Congress because such time limitations and standards proved to be unwise and unattainable. As congently observed by Judge Noonan in his dissent to the court of appeals' majority opinion: "It would . . make nonsense of the new law to hold that the old disapproval must continue in effect despite the relaxation of the standards effected by the 1990 changes." (EPA Petition, App. 31a.)

If permitted to stand, the Court of Appeals' decision will deprive state and local air quality planning agencies such as SCAG the opportunity to prepare, suggest and implement air pollution control strategies. SCAG believes Congress intended that state and local agencies prepare air pollution control plans in the first instance. Thus, the Court of Appeals' decision turns the Act on its head by mandating EPA promulgation of a FIP at this time, thereby denying the state and local agencies in Southern California the ability to plan and develop air attainment strategies in the time frame and manner specifically authorized under the 1990 Amendments to the Federal Clean Air Act.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to consider summary reversal.

Respectfully submitted,

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December 10, 1992

APPENDIX A

§ 40460. (a) No later than January 31, 1979, the south coast district board shall adopt a plan to achieve and maintain the state and federal ambient air quality standards for the South Coast Air Basin. The plan shall be revised and adopted by the south coast district board by January 31, 1982, according to a schedule consistent with subdivision (a) of Section 40463. The plan revisions shall be compiled by the south coast district board, with the cooperation of the state board and the Department of Transportation, and the active participation of the Southern California Association of Governments and the counties and cities within the South Coast Air Basin.

(b) With the assistance of counties and cities, the Southern California Association of Governments shall have responsibility for preparing and approving the portions of the plan relating to regional demographic projections and integrated regional land use, housing, employment, and transportation programs, measures, and strategies. The Southern California Association of Governments shall analyze and provide emissions data related to its planning responsibilities.

(c) The south coast district shall have the responsibility for preparing and analyzing the portions of the plan elements relating to existing air quality, emissions data, results of air quality modeling, and stationary source control measures. The south coast district shall combine its portion of the plan with those prepared by the Southern California Association of Governments.

In consultation with the south coast district board, the Southern California Association of Governments, and

other appropriate local agencies, the state board shall provide the emissions reductions attributed to technological vehicular source control strategies included in the plan.

(d) Upon adoption by the state board, the plan and future revisions shall be the air quality management plan and, as submitted to the Environmental Protection Agency, the federally required state implementation plan for the South Coast Air Basin. Notwithstanding any other provision of this division, the state implementation plan for the air basin shall only include those provisions necessary to meet the requirements of the Clean Air Act (42 U.S.C. Sec. 7401 et seq.).

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§ 40463. (a) The plan shall be formally reviewed every two years beginning in 1982 by the agencies responsible for preparing plan revisions. In the event of revisions, the compliance schedules and emission limitations shall be amended to reflect advances in technology, control strategies, and administrative practices. The south coast district board may delay submittal of revisions up to two years if necessary to synchronize with the dates of submittal required under the Clean Air Act (42 U.S.C. Sec. 7401 et seq.).

(b) With the active participation of the Southern California Association of Governments, a South Coast Air Basin emission carrying capacity for each state and federal ambient air quality standard shall be established by the south coast district board for each formal review of

the plan consistent with subdivision (a) and shall be updated to reflect new data and modeling results. A carrying capacity is the maximum level of emissions which would enable the attainment and maintenance of an ambient air quality standard for a pollutant. Emission carrying capacity for state standards shall not be a part of the state implementation plan requirements of the Clean Air Act for the South Coast Air Basin.

(c) The state board shall review and comment, within 60 days of submittal by the south coast district, on the emission carrying capacity, air quality model selection, and all other data required by this section. The south coast district board and the Southern California Association of Governments Executive Committee shall consider the comments of the state board and shall either accept the state board's recommendations regarding carrying capacity or shall advise the state board that the recommendations are not accepted.

(d) If the state board receives notification that its recommendations are not accepted, the state board shall convene a conflict resolution committee within 30 days to attempt to resolve the differences. The committee shall be composed of two members each of the state board, the Executive Committee of the Southern California Association of Governments, and the south coast district board appointed by the entity they represent. The committee shall make a recommendation to the three governing boards.

§ 40464. The Southern California Association of Governments shall coordinate the efforts of the counties and cities in the process of developing and reviewing plan elements which meet the requirements of the plan, state and federal law, and local needs relating to transportation, land use, demographic projections, employment, housing, and other matters of local concern.

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§ 40465. The Southern California Association of Governments shall submit its plan elements to the south coast district board by June 1 of each odd-numbered year, except in the case of a delayed submittal as provided in subdivision (a) of Section 40463, for incorporation into the air quality management plan. The district shall combine the association's plan elements with the south coast district elements as specified in subdivision (a) of Section 40460. Each agency shall prepare and submit all necessary documentation, including that of public and intergovernmental involvement.

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On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS COALITION FOR CLEAN AIR AND SIERRA CLUB

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QUESTIONS PRESENTED

1. Does Section 110(c) of the Clean Air Act, as amended in 1990, 42 U.S.C. § 7410(c), require the Environmental Protection Agency ("EPA") to promulgate Federal Implementation Plans ("FIPs") for ozone and carbon monoxide for the South Coast Air Basin based upon EPA's disapproval in January 1988 of the State Implementation Plan submitted for the South Coast?

2. Should EPA's representations to Congress prior to enactment of the 1990 Clean Air Act Amendments, that the language ultimately adopted in Section 110(c) would mandate completion of the South Coast FIPs, be considered persuasive in interpreting the intent of Congress?

3. Independently of the requirements of Section 110(c), does Section 193 of the 1990 Amendments, 42 U.S.C. § 7515, preserve a settlement agreement and order thereon that, as of the date of the Amendments, required EPA to finalize the South Coast FIPs and associated control requirements by February 28, 1991?

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Clean Air Act, 42 U.S.C. § 7401 *et seq.*:

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BRIEF IN OPPOSITION OF RESPONDENTS COALITION FOR CLEAN AIR AND SIERRA CLUB

The Coalition for Clean Air and Sierra Club (jointly, the "Coalition")[1] oppose the Southern California Association of Governments' ("SCAG") Petition for Writ of Certiorari ("Petition") and urge that the Petition be denied. As set forth in more detail in the Coalition's December 9, 1992, Brief in Opposition ("Coalition Brief") to the Environmental Protection Agency's ("EPA's") parallel petition for writ of certiorari ("EPA

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[1]Respondents Coalition for Clean Air and Sierra Club are not-for-profit corporations that do not have publicly traded stock, or parent or subsidiary corporations. Sup. Ct. R. 29.1.

Petition") in No. 92-798, the Ninth Circuit Court of Appeals correctly held that EPA is obligated to complete Federal Implementation Plans ("FIPs") for California's South Coast Air Basin, a holding applicable to a very limited set of specific situations that will not recur.

Since the SCAG Petition largely repeats and incorporates the EPA Petition, in response the Coalition incorporates and relies upon the December 9, 1992, Coalition Brief in its entirety.

The reason for SCAG's separate petition is unclear. SCAG was a party to the same appeals addressed by the EPA Petition in No. 92-798, and by virtue of Supreme Court Rule 12.4 SCAG is deemed to be a party to the proceedings before this Court as initiated by the EPA Petition. However, SCAG elected not to file a brief in support of the EPA Petition within the twenty day period provided under Supreme Court Rule 12.4, a period that cannot be extended. Instead, SCAG has styled as a separate petition what amounts to a brief in support of the EPA Petition -- as such it is not timely filed.[2]

The nature of SCAG's pleading is apparent from the fact

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[2]As with the brief filed by the Los Angeles Area Chamber of Commerce ("Chamber"), the practical effect of this approach was to prevent the Coalition from addressing in the original brief in opposition the points made by SCAG. It also potentially reopens a thirty day period for filing this opposition. In order to move this matter forward promptly, the Coalition has filed this brief in opposition well in advance of that new deadline, and respectfully requests that the matter be set for conference so that further delays in the FIP can be minimized.

Although this situation appears somewhat unusual since EPA filed its Petition approximately five weeks before it was due, so the twenty day period ran before the original deadline to petition for certiorari, there seems to be no reason to allow SCAG to avoid that twenty day limit simply by characterizing its supporting brief as a separate petition.

that SCAG's statement of the "questions presented" is virtually identical to EPA's and SCAG relies throughout its Petition on reference to EPA's Petition to provide essential elements of its own Petition.

The reasons stated by SCAG for granting the petition also closely parallel the arguments made by EPA. For that reason, the Coalition relies principally on its earlier Coalition Brief to respond to most of the arguments in SCAG's Petition. Only key points and points not previously raised by EPA are addressed below.

SCAG first describes the extensive state plan prepared by SCAG and the South Coast Air Quality Management District ("SCAQMD") and submitted to EPA in 1989, and expresses the concern that EPA's FIP will be prepared without considering this state plan. SCAG Petition at 5. But there is nothing in the 1990 Amendments or the Ninth Circuit's opinion that prevents EPA from dovetailing its plan with the already-submitted state plan. Indeed, a coordinated state/federal process is expressly allowed under the new definition of FIPs, added by the 1990 Amendments:

> The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emissions limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

42 U.S.C. § 7602(y) (Supp. II 1990). This is exactly what EPA

recommended in the proposed FIP rulemaking published September 5, 1990. 55 Fed. Reg. 36,458 (1990).

Significantly, SCAG recognizes that, "[m]ost of the work on the matters which are necessary in order to develop a realistic attainment plan has been completed or is in the process of being completed." SCAG Petition at 6. This concession discloses as mere rhetoric the claim that completion of the FIP at this time will prevent the state from taking the initiative to develop plan requirements. SCAG and SCAQMD have been working on this plan now for over twenty years, and a complete plan was submitted in 1989, as SCAG recognizes. The state has therefore had the opportunity to serve as the "primary source of the plan . . . ." *Id.* The fact remains, however, that the plan cannot show attainment of the ambient air quality standards by the statutory deadline without federal measures, as discussed at length in SCAQMD's brief in opposition to the EPA Petition.

Curiously, SCAG argues that EPA should have a secondary "backstop" role that is limited to filling gaps in the state plan, but this is exactly what EPA did in the September 1990 proposed FIP -- an approach that now is expressly permitted by the new FIP definition quoted above. No party, including the Coalition, has ever argued to the contrary -- i.e., that the FIP will need to be complete in and of itself. The Ninth Circuit, for its part, properly applied this principle by recognizing that, "a FIP, as defined by the 1990 Amendments, is specifically designed to supplement rather than to replace state planning . . . ." EPA Petition at 16a n. 10. The Ninth Circuit also confirmed that, "there appears to be nothing to stop EPA from allowing California to rely on anticipated technology by approving SIP provisions that now meet the requirements of the Act." EPA Petition at 15a. The harms forecasted by SCAG are unsupported; in any event those harms are not implicated by the

language of the Ninth Circuit's decision.

SCAG's speculation that EPA's FIP will not be tailored to local circumstances (SCAG Petition at 6-7) fails to cite any real basis for this concern or to point to any particular limitation on EPA's ability to adapt the FIP to local circumstances. In fact, no such limitation exists. EPA can regulate industrial areas differently than residential areas, for example, just as can SCAG and SCAQMD.[3]

The concern that SCAG will be frozen out of the FIP process (SCAG Petition at 8 - 9) likewise is unsupported. The Coalition for its part is fully supportive of a reasonable period for FIP development that allows receipt of public input (at minimum) through public comment following publication of a revised FIP proposal. The FIP can take into account the concerns expressed by SCAG and others and can also take advantage of the new flexibility in the 1990 Amendments. The specific concern that SCAG demographic analyses and population forecasts will not be addressed is belied by the September 1990 proposed FIP which in fact relied on those projections. 55 Fed. Reg. at 36,501 ("EPA's proposed FIP for ozone and CO is largely based on the State's recent draft baseyear inventory for calendar year 1987 and the State's projected inventories for 2000 and 2010 contained in the 1989 AQMP").

The fact that neither SCAG, EPA nor the Chamber can identify specific reasons why the FIP will be irrationally burdensome, and instead must rely on general claims of hardship or dire forecasts of gas rationing and similarly preposterous

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[3]Similarly, SCAG's forecast that EPA's 1976 gas rationing fiasco will be repeated is not borne out by EPA's September, 1990, proposed FIP nor by any other authority.

proposals, discloses the underlying flaw in their analysis and the correctness of the Ninth Circuit's decision. As the Ninth Circuit held, there is no anomaly in having the FIPs proceed now, and the plain language of Section 110(c) continuing EPA's FIP duties should be enforced despite the long standing objections of some parties who might be affected. Those objections were presented to Congress but rejected; Congress' determination is dispositive.

As with the Chamber's amicus brief, the nature of SCAG's arguments illustrates that this is fundamentally a political matter that was resolved by Congress in the 1990 Amendments through the compromise language selected in Section 110(c) and in the FIP definition quoted above. As EPA Administrator Reilly recognized, however, this compromise language continued the agency's obligation to complete the FIPs for the South Coast.

Respectfully submitted,

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